INDEX

CITATIONS

739051—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 235

W. H. WILSON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 16–34) are not reported. The opinion of the Circuit Court of Appeals (R. 45–47) is reported at 161 F. 2d 661.

JURISDICTION

The judgment of the Circuit Court of Appeals, affirming the decision of the Tax Court, was entered on May 1, 1947 (R. 47). The petition for a writ of certiorari was filed on July 31, 1947. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judical Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under Section 22 (a) of the Internal Revenue Code, petitioner is taxable on that share of income from a partnership of which he was a member, which was purportedly given to his daughter on the occasion of her seventeenth birthday.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 22 [as amended by Public Salary Tax Act of 1939, c. 59, 53 Stat. 574, Sec. 1]. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and

income derived from any source whatever. * * * (26 U. S. C. 1940 ed., Sec. 22.)

STATEMENT

The Commissioner of Internal Revenue determined deficiencies in federal income tax against the petitioner (herein referred to as the taxpayer) for the years 1940 and 1941 in the respective amounts of $6,820.48 and $42,042 (R. 6–15). In his petition to the Tax Court for review of the Commissioner's determination (R. 3–6), the taxpayer raised several issues with respect to each of which the Tax Court made specific findings of fact and rendered a separate opinion (R. 16–34).

During the years involved, the taxpayer, a resident of Greenville, South Carolina (R. 17), was a member of a partnership, W. H. Wilson Company, which was engaged in the cotton brokerage business, in the merchandising of cotton on its own account, and also in transactions on the market in cotton and stocks. It also furnished the personnel for the operation of a warehouse company, from which it received monthly compensation (R. 17). From 1928 to June 30, 1935, the business had been conducted by a corporation known as W. H. Wilson, Inc. When the corporation was organized, 186 shares of stock were issued, of which 10 were issued in the name of the taxpayer and 176 in the name of his wife, Clarice T. Wilson. Mrs. Wilson paid in $5,000 cash and

gave her note for the balance, which she paid off in 1930 by mortgaging her house for $7,500. (R. 18.)

W. H. Wilson Company, the partnership, was formed by the taxpayer and his wife in 1934 under the following circumstances: W. H. Wilson, Inc. (the corporation), handled cotton in Greenville, South Carolina, for Crespi & Company, cotton merchants of Dallas, Texas. In 1934, the taxpayer negotiated with Crespi & Company for the construction and operation of a warehouse to facilitate handling Crespi's cotton. The taxpayer and his wife then formed the partnership, W. H. Wilson Company, in 1934, for the purpose of acquiring stock in the warehouse company and of constructing and operating the warehouse. When the transaction was consummated, the details of which are not important here, the partnership owned 85 shares of stock in the warehouse company and a corporation operated by Crespi & Company owned the other 90 shares. (R. 18.)

At the close of its fiscal year ended June 30, 1935, W. H. Wilson, Inc., was dissolved and liquidated. W. H. Wilson Company took over its assets and assumed its liabilities, and continued its cotton brokerage business, using the same books, the same office space, and the same personnel. The partnership operated on the basis of a fiscal year ended June 30, and partnership returns of income have been filed for W. H. Wilson

Company beginning with the fiscal year ended June 30, 1935, and continuing through the years here involved. (R. 17, 18–19.)

S. E. Adams and W. H. Wallace had been employed by W. H. Wilson, Inc., up until the time of its dissolution in 1935. During 1932 and 1933, the corporation was in financial difficulties and unable to pay salaries due to Adams and Wallace. At the time of liquidation, there were sums owing to these employees on the books of the corporation and they were promised interests as partners in W. H. Wilson Company. They continued to work for W. H. Wilson Company, but it was not until July 1, 1937, that they were brought in as partners. The partnership returns for the fiscal years ended in 1938 and 1939 listed the partners as the taxpayer and his wife, each having a 40-percent interest, and Adams and Wallace, each having a 10-percent interest. Both Adams and Wallace recognized Mrs. Wilson as a co-owner of the business. (R. 19–20.)

On August 13, 1939, the seventeenth birthday of Marjorie Anne, the Wilson's daughter and only child, the taxpayer and his wife each gave her a signed paper reciting the gift to her of a 10-percent interest in the partnership. On the occasion of Marjorie Anne's eighteenth birthday, Mrs. Wilson informed her that she was to have an additional 5-percent interest in the business. (R. 20.)

The partnership return for the fiscal year ended June 30, 1940, listed as partners the taxpayer and Mrs. Wilson, each having a 30-percent distributive share of the profits, Marjorie Anne, with a 20-percent distributive share, and Adams and Wallace, each having a 10-percent distributive share. The partnership return for the fiscal year ended June 30, 1941, stated that the partners were the taxpayer, with a 30-percent interest, Mrs. Wilson and Marjorie Anne, each with a 25-percent interest, and Adams and Wallace, each with a 10-percent interest. (R. 21.)

The taxpayer, Adams, Wallace, and three employees—one a bookkeeper—were actively engaged in the business of W. H. Wilson Company. Mrs. Wilson and Marjorie Anne, neither of whom had any experience in the grading or selling of cotton, performed no services for the partnership and took no active part in the management and operation of the business. Checks drawn on the partnership bank account were signed by the bookkeeper and were required to be countersigned by the taxpayer, Adams, or Wallace. (R. 20.)

There are no individual capital accounts on the books of the partnership, but a single investment account is carried for all. Net profits for each year are credited to an account entitled "Surplus". The taxpayer, Mrs. Wilson, Marjorie Anne, Adams, and Wallace have personal or drawing accounts. Distributions are made at only two-

or three-year intervals and involve a charge to surplus and credits to the drawing accounts. One such distribution was made on June 30, 1941 in the amount of approximately $82,000. At the same time, approximately $142,000 was transferred from the surplus account to the investment account to bring the balance in the latter up to $150,000. (R. 20–21.)

There never has been a written partnership agreement between the taxpayer and his wife, or between them and Adams and Wallace. Mrs. Wilson had a drawing account on the books when the business was conducted by the old corporation and she has a similar account on the books of the partnership. (R. 21.)

The first entry in an account for Marjorie Anne was a credit of $20,607.85 from the "distribution of profits" on June 30, 1941. Shortly thereafter, Marjorie Anne's funds were transferred to the taxpayer's personal account, and the taxpayer informed her he was holding the funds in trust and administering them for her because she was a minor. Thereafter the taxpayer made a number of investments and expenditures for his daughter, among them a $15,000 single premium life insurance policy purchased in her name, 34 shares of stock in the warehouse company operated by the partnership (such 34 shares being a part of the 85 shares originally acquired by the partnership as set out above and held by it as an asset), a cer-

tificate therefor being issued in Marjorie Anne's name on July 1, 1942, an automobile, a fur coat, and from $1,800 to $2,000 on her college education. (R. 21.)

Mrs. Wilson and Marjorie Anne both draw on the business for their personal expenses. In addition to her purely personal expenses, Mrs. Wilson drew funds for other purposes which are not material here. (R. 21–22.)

In determining the original deficiencies here involved, the Commissioner, among other things, added to the income reported by the taxpayer for the years involved that part of the partnership income of W. H. Wilson Company which had been reported by Mrs. Wilson and Marjorie Anne as their distributive share for the respective years indicated (R. 6–15).

On the basis of the evidence before it, the Tax Court found as a fact that, in 1940 and 1941, Mrs. Wilson was a bona fide partner engaged in carrying on business in partnership with the taxpayer, Adams, and Wallace. It also found as a fact that, in 1940 and 1941, Marjorie Anne was not a bona fide partner in W. H. Wilson Company, and that the interest of the taxpayer and Mrs. Wilson in the partnership was 40 percent each, and the interest of Adams and Wallace was 10 per cent each. (R. 22.) As a result of these findings, the Tax Court held that the taxpayer, in addition to the 30 percent of partnership income

which he had reported in each year as his distributive share, was also taxable upon the 10 percent of the partnership income which had been reported each year by Marjorie Anne by reason of the purported gift by the taxpayer to her of a 10 percent interest in the partnership (R. 22–25).

The Tax Court also held that Mrs. Wilson was taxable on that part of the partnership income reported by Marjorie Anne on account of the purported gifts to her of partnership interest by Mrs. Wilson (R. 22–25). The correctness of that part of the Tax Court's decision relating to Mrs. Wilson's interest in the partnership is not involved here, however.

The Circuit Court of Appeals affirmed the Tax Court's decision, *per curiam* (R. 45–47).

ARGUMENT

This is another in the long line of cases arising both before and since this Court's decisions in *Commissioner* v. *Tower,* 327 U. S. 280, and *Lusthaus* v. *Commissioner,* 327 U. S. 293, which involve the treatment for federal income-tax purposes of the income of so-called family partnerships. Each such case depends entirely upon its own facts. Whether the taxpayer's daughter was a bona fide member of the partnership, W. H. Wilson Company, for the years 1940 and 1941 for federal tax purposes is a question of fact. The Tax Court found, on the evidence before it, that the taxpayer's daughter was not a bona fide part-

ner in those years and that the taxpayer was taxable upon that part of the income attributable to the 10-percent interest in the partnership which he purported to give his daughter in August 1939.

That the question here involved is essentially a question of fact is abundantly clear from this Court's decisions in *Commissioner* v. *Tower, supra,* and *Lusthaus* v. *Commissioner, supra.* See, also, *Burnet* v. *Leininger,* 285 U. S. 136. In this situation, the only question for review by the Circuit Court of Appeals was whether the finding of the Tax Court was supported by substantial evidence. *Dobson* v. *Commissioner,* 320 U. S. 489, rehearing denied, 321 U. S. 231; *Commissioner* v. *Scottish American Co.,* 323 U. S. 119; *John Kelley Co.* v. *Commissioner,* 326 U. S. 521. Compare, *Thomas* v. *Feldman,* 158 F. 2d 488 (C. C. A. 5th). That there is such support in this record can hardly be gainsaid.

The taxpayer's effort to distinguish the instant case from *Commissioner* v. *Tower, supra,* and *Lusthaus* v. *Commissioner, supra* (Pet. 7–15), can be of no avail, for he is taxable on the income involved under principles established by this Court not only in those cases but also in such cases as *Lucas* v. *Earl,* 281 U. S. 111; *Helvering* v. *Clifford,* 309 U. S. 331; *Helvering* v. *Horst,* 311 U. S. 112, and numerous others. "The Tower and Lusthaus cases merely apply the rule [of these cases] to situations where the Tax Court has found that

individuals are attempting through pseudo-partnerships to do the forbidden thing, separate earner from income, the tree from its fruits." *Sherf* v. *Commissioner,* 161 F. 2d 495, 498 (C. C. A. 5th).

Nor is there any merit to the taxpayer's argument (Pet. 15–16) that the decision below in this case is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Durwood* v. *Comissioner,* 159 F. 2d 400. That case, like the instant case, depended wholly upon its own facts. It was a case, the Eighth Circuit thought, in which, unlike this one, "the great bulk of the share going to the wife, son and daughter came not from petitioner but from his brothers, and hence, it did not and could not reduce petitioner's income," 159 F. 2d at 404. We think the Circuit Court of Appeals, in reversing the decision of the Tax Court, probably exceeded its authority to review decisions of that court in such cases. But regardless of whether the Circuit Court of Appeals was right in that case, there cannot be a conflict of decisions because of the essential factual character of the two cases. Furthermore, the decision below in this case clearly is correct, and since this Court has only recently delivered its views with respect to the problem here involved, a writ of certiorari is not likely to serve any useful purpose.

CONCLUSION

The decision below is correct. It is supported by the facts and the law, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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